No. 91-72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION,

Petitioner,

v.

TICOR TITLE INSURANCE COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE IN SUPPORT OF RESPONDENTS

The National Council on Compensation Insurance ("NCCI") submits this Brief Amicus Curiae to respectfully request the affirmance of the decision of the United States Court of Appeals for the Third Circuit.

INTEREST OF AMICUS

NCCI is a not-for-profit organization that provides a wide variety of services to the workers' compensation insurance industry. Its membership includes approximately 750 insurance carriers and competitive state insurance funds[1]

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[1] A competitive state insurance fund is a statutory entity that functions in the market like a private carrier and may compete with private carriers. In some states the fund is required to provide insurance to bad risks that cannot obtain coverage from a private carrier. *See* 3 *Larson's Workmen's Compensation* § 92.50 (desk ed. 1991).

that together provide workers' compensation and employers' liability insurance coverages to employers in forty-four[2] states and the District of Columbia. In thirty-two of these states, NCCI is a licensed rating bureau or advisory organization for workers' compensation and employers' liability insurance. In most of the remaining states, NCCI plays some role in workers' compensation insurance ratemaking and rulemaking.

As a rating organization, NCCI collects and reports data, develops systems for the uniform classification of risks by employment category, designs policy forms and endorsements, and purposes rates and rating plans. *See Larson's Workmen's Compensation, supra* note 1 at § 92.60. NCCI's activities in these matters are authorized by state law and regulated by state insurance authorities.

Workers' compensation insurance is mandatory for employers in virtually every state. *Id.* at § 92.11. Some employers that must purchase this coverage are not, however, individually insurable. Smaller and newer companies and those with poor safety records may be considered unacceptable risks by a carrier. In order to accommodate the insurance needs of these employers, certain states with the cooperation of their workers' compensation insurers have established mechanisms that assure workers' compensation insurance to all employers within the state. This separate mechanism for workers' compensation insurance is open to all employers that have been refused coverage by carriers on an individual basis, and is called the "residual" or "involuntary" market. NCCI manages the residual market mechanism in thirty-one states and in the District of Columbia. NCCI is also responsible for the development and filing of rates and rules for the

[2] Six states generally do not allow a workers' compensation insurance market. These states have created a monopolistic state fund to provide coverage to employers that cannot qualify to self-insure their workers' compensation liabilities. NCCI is a qualified advisory organization in all six states.

residual market mechanism. These rates and rules guarantee the availability of workers' compensation insurance policies for higher risk employers.

NCCI is not authorized to mandate rates or rules. These rates and rules must be developed in conformity with and be responsive to applicable state workers' compensation and insurance laws and they must be submitted for substantive review to the insurance regulator in each state. They are then approved or disapproved in accordance with the insurance laws of the state.

The filing of rates, classification systems, rules and policy forms is universally required by statute or regulation. The insurance regulator is required to review all filings to ensure their conformity with a statutory standard — usually a "just and reasonable" test or a "not excessive, inadequate or unfairly discriminatory" test. The statutory tests have various objectives — insurer solvency, equal treatment of similarly situated consumers, and fair pricing of the insurance product. In regulating workers' compensation insurance, it is also vitally important for the regulator to ensure that the market, and the residual market mechanism, remain intact and can respond to the requirement that complete and affordable coverage is universally available. There is no state in which the insurance regulator lacks the power to approve or disapprove or thoroughly investigate any filing in keeping with these objectives.

Nevertheless, the regulatory environment and the rules that govern it vary among the states.[3] All state laws facially require a substantive review but for a host of reasons, a regulator may be more or less inclined to fully employ the statutory arsenal of options that are available in response to a particular filing. Effective resource allocation, historical factors and experience, public controversy, known problems in the market and the importance of the filing to the insurance consumer may affect the regulator's discretion in any given case. The regulators are neither bashful nor disinterested, and they clearly have and exercise the flexibility to experiment with the regulatory options available in the pursuit of acceptable results. Sometimes, perhaps often, they opt for minimal supervision, especially where many years of experience teaches that more is not required. When that option is selected, it is invariably the regulator's choice.

In the instant case, the court below declined the Federal Trade Commission's ("FTC") invitation to test the quantity, quality, and effectiveness of the regulators' choices. It is not claimed by the FTC that the choices were not made or that they were not the regulators' choices, only that they were not

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[3] The common rule contemplates a public filing followed by a waiting period, at the end of which the filing is deemed approved, unless the regulator has issued a notice of disapproval or ordered a hearing. *See e.g.*, Colo. Rev. Stat. § 10-4-406 (1987 and Supp. 1991); Conn. Gen. Stat. Ann. § 38a-676(b) (West Supp. 1991); Haw. Rev. Stat. § 431:14-104 (Supp. 1990); Iowa Code Ann. § 515A.4 (West 1988); La. Rev. Stat. Ann. §§ 22:1407(D), 1408 (West 1978 and Supp. 1991); S.D. Codified Laws Ann. §§ 58-24-17-19 (1990). In these states and in those with similar laws, the regulators typically may order a hearing as a matter of discretion. A smaller number of states require the regulator to affirmatively approve or disapprove a filing before it may become effective. *See e.g.*, Ala. Code § 27-13-68 (1986); Fla. Stat. Ann. §§ 627.101, 141, 151 (West 1984); Tenn. Code Ann. § 56-5-306 (1989); Utah Code Ann. § 31A-19-406 (1991); Va. Code Ann. § 38.2-2006 (1990). There are several other variations on these themes. Only Maine requires a hearing on a rate filing whether or not it is requested. Me. Rev. Stat. Ann. tit. 24-A, § 2319 (1990 & Supp. 1991).

good enough to earn the respect that must be accorded to the acts of states as sovereigns in an antitrust context. In seeking reversal of the decision below, the FTC asks this Court to adopt a standard requiring the regulator to evidence his or her choice by some form of "affirmative determination" showing that the private collective conduct has been proven to be consistent with state policy.

It is not clear precisely what level of inquiry the FTC would consider adequate, but it is clear to NCCI that the test proposed would destabilize, by exposing to antitrust disruption, the longstanding and generally well supervised system for insuring workers' compensation benefits in most states. NCCI submits this brief amicus curiae to emphasize that the matters directly presented to the Court in this case are small parts of a vastly larger picture. The larger picture can be caused to disassemble if this Court concludes that those states which have chosen to authorize collective insurance ratemaking, have failed to protect this process where the statutory regulator is permitted to expeditiously review non-controversial filings that are, in the regulator's unspoken judgment, consistent with the state's regulatory policies.

NCCI's interest in this case is apparent. NCCI urges the Court to consider the impact the FTC's test would surely have on the workers' compensation insurance industry and state workers' compensation systems as well.

SUMMARY OF ARGUMENT

NCCI, on behalf of its members, urges affirmance of the decision below. NCCI's collective rate and rulemaking functions are authorized by state insurance laws. These activities are regulated by the same insurance authorities that regulate title insurance, and the relevant state laws that establish the regulatory regimes are the same or similar as well. Yet, the case presented to the Court is anecdotal. NCCI urges the

Court to consider this case in light of its potential impact on the workers' compensation insurance industry.

The workers' compensation program and the insurance regulatory program in a state are linked. In order to provide fully adequate workers' compensation insurance coverage, rating organizations like NCCI must be prepared to respond quickly and efficiently to legislative amendments and external factors that directly affect the affordability of workers' compensation insurance and insurer solvency. State insurance regulators must also have the flexibility and authority to facilitate the state's workers' compensation objectives in light of the state's insurance regulatory policies. It is sometimes, perhaps often, the case that this can and should be accomplished without intensive investigation. When the regulator chooses this course, the choice is informed and it is made by the regulator as an officer of the state.

The FTC asks this Court to redefine the regulator's job and dictate the performance standards that must be met to prevent nullification by the federal antitrust laws of the regulatory choices made. The FTC's request is not in accord with this Court's jurisprudence mandating respect for state sovereignty.

This is a critical matter for NCCI, workers' compensation insurers and state workers' compensation systems. Where NCCI is required by state law to develop and propose rates and rules, it must do so with the understanding that the regulators that protect this collective activity from antitrust liability, will not later be tried under the federal antitrust laws to determine whether they did their jobs effectively. The FTC proposes an "active supervision" test that virtually assures repeated and constant trials of state insurance regulators under a subjective standard that will surely produce unpredictable consequences.

This prospect, in turn, and the uncertainty it will cause must call into question the ability of the workers' compensation insurance industry to provide this line of insurance for employers and workers in many states. The solvency of workers' compensation insurance programs is entrusted by state law to state insurance regulators. The objectives of the federal antitrust laws are not achieved by shifting this critical responsibility to federal judges and juries. To do so not only diminishes state sovereignty, but it jeopardizes a critical social insurance program as well.

ARGUMENT

A. An "Affirmative Determination" Test Would Disrupt State Workers' Compensation Systems

A workers' compensation program is typically the largest social insurance program administered by any state.[4] It is an important matter in every state, affecting every employer and in the aggregate millions of workers and their families. State legislators pay considerable attention to their state's workers' compensation laws. In each year, over the last decade, the states collectively have considered from 500 to 1,000 amendments to their workers' compensation laws. Many are enacted. It is common for states to regularly increase benefits, expand coverage, revise filing limitations, enlarge the scope of

[4] The federal government administers three workers' compensation programs, the Longshore Act and its extensions, 33 U.S.C. §§ 901-950, the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, and the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151. The latter is self-insured by the United States. Commercial insurance rates for federal black lung and longshore coverages are established by state regulators.

medical and rehabilitation benefits and the like.[5] It is also not unusual for states to redesign portions of their workers' compensation laws to address the concerns of certain industries, to attract new business to the state, to respond to the demands of worker representatives or to pursue workplace safety and health objectives.

Amendments that are enacted often have a direct and significant impact on costs. They may also affect underwriting rules, policy forms and classification and rating systems, all of which play a role in the pricing of the workers' compensation insurance product. At the same time, workers' compensation insurance policies must respond to all of an employer's statutory liabilities without dollar limitation. Workers' compensation is the only major line of insurance in which losses attributable to a policy cannot be limited to a set dollar amount. Neither does the workers' compensation insurer have the option to exclude from coverage offered any type of risk or loss that is included by the state's workers' compensation law.

Within this complex political and legal environment, it is the job of the licensed workers' compensation insurance rating organization and the insurance regulator to respond to rapid, constant and often dramatic changes. These responses must be expeditious, targeted to the need, and maximally effective. Whatever the response, it must be submitted to the insurance regulator for approval for it to become viable. In most states, the applicable insurance law recognizes a degree

[5] This term, the Court is considering a case that graphically illustrates the sometimes frantic legislative activity that is common in the workers' compensation arena. *General Motors Corp. v. Romein, cert. granted,* 111 S. Ct. 2008 (1991).

of urgency in these matters.[6] The law of the state relies on the regulator to carry out the duty to decide which filings require a high degree of regulatory scrutiny and which do not. The regulator's choice is informed by many factors including historical antecedents, experience, and public interest.

For workers' compensation insurance, this system of regulating has functioned reasonably well for decades. It guarantees intensive regulation when warranted, *e.g.*, where a significant rate increase is proposed. It also guarantees that lesser matters, *e.g.*, the modification of a classification or rating schedule, or a new policy form needed in response to changes in state law, are expeditiously and efficiently processed.

For workers' compensation insurers, their rating bureaus, the states, employers and employees, the FTC's proposed affirmative determination standard poses the threat of enormous disruptions in the funding of benefits for workers and their families.

B. The Workers' Compensation Insurance Industry Needs a Bright Line Active Supervision Test to Ensure Its Ability to Provide Its Insurance Product

The jurisprudence relevant to this case is fairly clear, even if no specific holding dictates an inexorable result. Principles of federalism limit the reach of the federal antitrust laws. *Parker v. Brown,* 317 U.S. 341 (1943). Private anticompetitive behavior that might otherwise be condemned is permitted, in light of these principles, where a state has chosen to displace competition in the market with regulation. A two

[6] Of thirty-four states' laws that employ a "deemed approved" procedure, twenty-five states provide for a waiting period of thirty days or less. Typically, the filing is available for public inspection during the waiting period and in some states the regulator is authorized to re-open the matter after expiration of the waiting period even if the filing has become effective and is in use. *See e.g.,* Kan. Stat. Ann. § 40-1113(f) (Supp. 1990); Wash. Rev. Code Ann. §§ 48.18.120, 48.19.450 (1991).

part test determines whether enough state sovereignty is exerted to warrant antitrust immunity for state sanctioned collective private conduct. First, the state must clearly articulate and affirmatively express its policy to restrict competition, and second, the state must actively supervise compliance with the policy articulated. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

The instant case addresses the "active supervision" part of the test. This Court held that when the state clearly articulates its policy and then walks away allowing the private parties to essentially self-regulate, that test is not met. *Id.; 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987). "The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policies." *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

The instant case, and indeed the bigger picture of insurance regulation by the states, does not present a setting in which the states merely stated their policy and left the private actors to make the best of it in their own interest. The states were on the scene in the person of their insurance regulators and the regulators were empowered. On the same day that a regulator may have decided to allow a title search and examination rate to go into effect without expressing an affirmative opinion, the regulator may have also held a public hearing on a proposed workers' compensation rate increase — or the reverse might be true in any year or in any state. The power to exercise this kind of judgment and make regulatory choices is a central component of state sovereignty. This Court's jurisprudence suggests that the regulator's choices or value judgments are best left to the official charged with making those

judgments and not federal judges or juries. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349, 1352 (1991).

The FTC's proposed affirmative determination corollary to the active supervision principle is an open ended invitation to micromanage state insurance regulators in the pursuit of antitrust enforcement. The difficulties suggested by this standard are apparent. It would result in an uncertain process. Rating bureaus, like NCCI, and insurers could never be sure that state regulators had acted with sufficient assertiveness to legitimize an otherwise approved filing, or whether the process itself exposed the insurers to massive antitrust litigation and potential treble damages as a result of the conduct of state employees over whom the insurers have no control.

For the FTC, it would not be enough for the regulator to simply but affirmatively state that a filing was approved. If the regulator were obliged to require the filing of extensive economic analysis would it then be necessary for the regulator to affirm that it was read — and understood? Must a regulator file a reasoned opinion or order explaining in some detail why a filing was approved or denied, and how in particular it does or does not comply with state policy? Must there be a hearing or some kind of proceeding? These inquiries cross the line drawn by the state action doctrine.

The workers' compensation insurance industry submits many filings with insurance regulators in many states throughout a year. These filings, in one way or another, invariably affect the price and the scope of the workers' compensation insurance product being sold. The industry relies on its regulators to carry out their statutory responsibilities and anticipates that they will do so. By the same token, it is critically important in every state permitting private insurance for workers' compensation, that affordable and *complete* insurance coverage be readily available whatever external or legislative changes are brought to bear on a state's workers' compensation program. To meet state policy objectives on

the insurance side and on the workers' compensation side, insurance regulators and state legislators have evolved regulatory patterns that are efficient and that work to these ends.

This case presents anecdotal regulatory events in several states. In each instance, the regulators carried out their duties under state law in a manner they deemed appropriate to the situation. The FTC's subjective, impressionistic standard seeks to deprive these regulators of the power to select the regulatory approaches they believe are most consistent with state policies. The standard greatly overreaches its anecdotal targets and favors a degree of disruption in historically long-standing regulatory behavior that is not warranted.

NCCI believes that the Third Circuit correctly decided this case. In reliance on this Court's jurisprudence, the court of appeals settled upon a bright line approach ensuring that the value judgments and regulatory options entrusted to fully empowered regulators will remain where the states and the antitrust laws intended.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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